Supreme Court, U.S.
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No. 94-573

In The
Supreme Court of the United States

October Term, 1994

DONALD R. MELLO, and
BARBARA J. MELLO, *Petitioners,*

vs.

JOYCE L. WOODHOUSE,et al., *Respondents.*

PETITION FOR WRIT OF CERTIORARI

PETITIONERS' REPLY BRIEF

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LIST OF PARTIES

The following persons and entities were parties to the proceedings in the Supreme Court of the State of Nevada. The petitioners in this Court are italicized, all others are respondents.

Plaintiffs-Appellants: DONALD R. MELLO and BARBARA J. MELLO

Defendants-Appelees: Joyce L. Woodhouse, Steve Cozine, John A. Caserta, Julius Conigliaro, and O.C. Lee as members of the Public Employees Retirement Board of the State of Nevada; Will Keating, as Executive Officer of the Public Employees Retirement System of the State of Nevada, and the Legislators' Retirement System.

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In the argument section of its opposing brief to case no. 94-573, Petition for Writ of Certiorari by Donald R. and Barbara J. Mello, the state of Nevada claims that "it is well accepted that this court will not review a decision of a state court resting upon independent and adequate state grounds."

However, in Waters-Pierce Oil Co v. Texas No. 1, 212 U.S. 97 (1908), this Court stated, "The jurisdiction of this court to review the proceeding of the state courts, as we have had frequent occasion to declare, is not that of a general reviewing court in error, but is limited to the specific instances of denials of Federal rights, whether those pertaining to the constitutionality of Federal or state statutes, or to certain rights, immunities and privileges of Federal origin, specially set up in the

state court and denied by the rulings and judgment of that court. Sec. 709, Rev. Stat. U. S. Nor does this court sit to review the findings of facts made in the state court, but accepts the findings of the court of the State upon matters of fact as conclusive, and is confined to a review of questions of Federal law within the jurisdiction conferred upon this court." (Emphasis added.) Quimby v. Boyd, 128 U.S. 488; Egan v. Hart, 165 U.S. 188; Dower V. Richards, 151 U.S. 658. What is more an issue for this court to decide than a pension case that is required to abide by federal law and regulation, yet doesn't, thereby causing a grievous breach of contract violating Art. I Sec. 10 of the U. S. Constitution.

The matter before this Court is breach of a retirement contract between Donald R. and Barbara J. Mello and the

state of Nevada which caused the forfeiture and reduction of retirement pension benefits.

This has resulted in former Senator Mello receiving a greatly reduced benefit, with penalties, for which he has neither applied or agreed.

And these are federal issues as declared by this Court in Alessi v. Raybestos-Manhattan, Inc., 451 US 504, 68 L.Ed.2d 402, 101 S.Ct.1895; "Congress having established pension plan regulation as exclusively a federal concern and, . . . pension terms themselves becoming expressions of federal law requiring preemption of intrusive state law." (Emphasis added.)

Therefore Nevada law can only dictate when former Senator Mello can begin collecting the increased benefits in which he vested upon his retirement. And

that would be January 1, 1991, the natural expiration of his term of office, unless this Court decrees that like other legislators, as detailed in the Petition, Mello's term of office ended when he retired and the Washoe County Commissioners appointed Peggy O'Neil to replace him for the November 21,1989, special session of the Legislature. Nothing in the Nevada Constitution says the legislature cannot increase their benefits, only they can't receive them during the term of office when they were increased. Nev. Const. art. 4, sec. 33.

The state of Nevada in its opposing brief again makes reference to the incorrect portion of ERISA and the U.S. Code that govern state and local government pensions. Title II of ERISA and subsequent federal laws amending ERISA and 26 USC are the areas of federal law and reg-

ulation that govern the Legislative Retirement System (LRS) and state of Nevada Public Employees Retirement System (NPERS).

These are the federal laws where Congress continues to extend the time allowing state and local governments to bring their pension plans into compliance with federal law, and the reason Congress has authorized the Internal Revenue Service to formulate model amendments within the Code of Federal Regulations for state and local government pension systems to adopt; the Model IID amendments (see 26 CFR Ch I (4-1-94 Edition) that would prevent the breach of contract normally protected by 26 USC 411(d)(6) and allow retroactive amendments to these plans; yet the Legislature of the state of Nevada never knew of these model amendments and therefore never passed any of the four

when they illegally repealed the increased benefits granted to legislators.

Congress also allowed state and local governments to adopt a "grandfather" clause to protect the benefits of those who had retired or earned benefits in excess of the limits set by 26 USC 415. Nevada adopted this grandfather clause July 5, 1991, making it retroactive to January 1, 1991; 15 months after the retirement of state Senator Donald Mello, thereby protecting the excess benefits of his pension. At no time prior to requesting the legislation to adopt this "grandfather" clause did Wilbur Keating, Executive Officer of NPERS inform the legislature of the need to adopt a protective clause, the existence of the limits on pension benefits, or the provisions available to protect the benefits earned by any Nevada public employee. At

no time did Keating inform the legislature of the provision allowing the establishing of an "optional form of benefit" plan that would avoid breaching the retirement contracts of vested legislators.

In Nachman Corp. v. Pension Benefit Guar. Corp., 446 US 359, this Court upheld the ERISA definition of a "nonforfeitable benefit" as follows: "The term 'nonforfeitable' when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participants service, which is unconditional, and which is legally enforceable against the plan." (Emphasis added.)

Also in Nachman, supra, this Court "relies on the fact that the terms 'nonforfeitable' and 'vested' were often

used interchangeably in the legislative materials. This usage is said to be significant because in the pension field a benefit is usually said to 'vest' when a pension plan participant has fulfilled all the specified conditions for eligibility, such as age and length of service." (Emphasis added.)

Therefore, Senator Mello's benefits had 'vested' upon his retirement because he met all the specified conditions needed at that time to be eligible for his pension.

In Pratt v. Petroleum Prod. Mngmt Employee Sav. Plan, 920 F.2d 65 (10th Cir. 1990) the district court determined that the plan was liable on two independent grounds: reduction of an accrued benefit under ERISA and breach of contract. "We [U.S. Court of Appeals 10th Circuit] agree with the district court."

The Appeals Court goes on to say a "pension plan is a unilateral contract which creates a vested right in those employees who accept the offer it contains by continuing in employment for the requisite years." (Emphasis added.) Hurd v. Illinois Bell Tel. Co., 234 F.2d 1, 942 (7th Cir.) cert. denied, 352 US 918, 77 S.Ct. 216, 1 L.Ed.2d 124 (1956) accord Hoefel v. Atlas Tack Corp., 581 F.2d, 4-5 (1st Cir.1978), cert denied, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed. 2d 462 (1979).

In Pratt, supra, the Court continued, "The fiduciaries are required to administer the plan "solely in the interest of the participants and beneficiaries." This was clearly not done by either Will Keating or the Members of the NPERS Board as evidenced by their lack of informing the legislature, all of whom

are required by law to be members of LRS, of the need to comply with federal law.

As the Court continued with Pratt, supra, "When plaintiff was terminated, defendant was required to determine benefits in accordance with the plan then in effect." (Emphasis added.) See Brug v. Pension Plan, 669 F.2d 570, 575-76 (9th Cir.), cert denied, 459 US 861, 10 S.Ct. 135, 74 L.Ed. 2d 116 (1982); Danti v. Lewis, 312 F.2d 345, 349 (D.C. Cir. 1962); Plaxall, 541 F.Supp. at 1391; Denzer, 474 F.Supp. at 391; Denzer, 474 F.Supp. at 766. "Subsequent unilateral adoption of an amendment which is then used to defeat or diminish the plaintiffs fully vested rights under the governing plan document is not only ineffective but also arbitrary and capricious. (Emphasis added.) See Brug, 669 F.2d at 574-76; Danti, 312 F.2d at 348-49; Denzer, 474

F.Supp. at 766.

In Weil v. Retirement Plan Administrative Committee, 913 F.2d 1045 (2nd Cir.1990) regarding who in the federal government was responsible for overseeing pension plans, the court stated, "We accord 'great weight' to these regulations and rulings since the IRS [Internal Revenue Service] is the agency responsible for administrating the partial termination statute." Amato v. Western Union Int'l Inc., 773 F.2d 1402, 1415 (2d Cir.1985), Cert. dismissed, 474 US 1113, 106 S.Ct. 1167, 89 L.Ed. 2d 288 (1986); Weil I, 750 F.2d at 12.

Although the Nevada LRS was not partially terminated, the retroactive amendment of the 1989 Special Session of the Legislature resulted in breach of Mello's retirement contract, <u>after he retired and began receiving benefits,</u> and forced him,

without choice, as allowed by IRC 1.411(a)-8T, to accept benefits under the previous schedule, which resulted in his receiving a 28.5 percent reduction in those old benefits because of his age of 55 years at the time of retirement.

Since the passage of ERISA and the amendments to 26 USC 401 et seq. the Internal Revenue Service has promulgated many regulations that apply to pension plans. These include 1,411(d)-4,(2) Section 411(d)(6) protected benefits that may be eliminated or reduced.[1] This reg-

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[1](i) Change in statutory requirement. A plan may be amended to eliminate or reduce a section 411(d)(6) protected benefit if the following three requirements are met: the amendment constitutes timely compliance with a change in law affecting plan qualifications; there is an exercise of section 7805(b) relief by the Commissioner; and the elimination or reduction is made only to the extent necessary to enable the plan to continue to satisfy the requirements for qualified plans. In gener-

ulation became effective January 30, 1986, and the 1987 and 1989 sessions of the Legislature were never informed.

The Retirement Equity Act of 1984 (P.L. 98-397) clarifies the scope of the prohibition against decreases in the accrued benefit of a participant. The Act prohibits the elimination or reduction of an early retirement benefit by a plan amendment that changes the basis for determining actuarial equivalency with respect to previously accrued benefits except as to amendments approved by the Secretary of the Treasury. However, the elimination or reduction of a retirement

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limination or reduction of a
11(d)(6) protected benefit
be treated as necessary if
sible through other modifi-
o the plan (e.g. by expand-
vailability of an optional
enefit to additional employ-
atisfy the applicable quali-
requirement. (Emphasis

type subsidy is only prohibited with respect to a participant who satisfies (either before or after the amendment) the preamendment conditions for the subsidy. Senator Mello satisfied all requirements of the LRS, including the early retirement benefit, with no penalties, prior to his retirement and prior to the repeal of the early retirement benefit. (Emphasis added.)

According to IRS regulation 1.411(d)-4, "Q&A-6, a plan may not be amended to eliminate or reduce a protected benefit that has already accrued, even if the elimination or reduction is contingent upon the employee's consent. Senator Mello never consented to the elimination or reduction in his benefits, was never asked, and his legal representative was not allowed to address either house of the legislature. In Costantino

v. TRW, Inc., 773 F.Supp. 34 (N.D. Ohio 1991), "It is now well established that legislative Acts adjusting the burdens and benefits of economic life come to this Court with a presumption of constitutionality, and that the burden is on one complaining that the legislature has acted in an arbitrary and irrational way." 467 U.S. 717, 729, 104 S.Ct. 2709, 2717, 81 L.Ed.2d 601.

Regulation 1.411(d)-4, (4-1-94 edition) Q-2: "To what extent may section 411(d)(6) protected benefits under a plan be reduced or eliminated?" A-2: (a) "Reduction or elimination of section 411(d)(6) protected benefits--(1) In general. A plan may not be amended to eliminate or reduce a section 411(d)(6) protected benefit that has already accrued, except as provided in section 412(c)(8) and 4281, and in paragraph (b) of this

Q&A-2. This is generally the case even if such elimination or reduction is contingent upon the employee's consent." (Emphasis added.) See footnote 1 and above.

IRS regulation 1.401(a)-11(b) Definitions.(4) "Qualified early retirement age. The term "qualified early retirement age" means the latest of -- (i) The earliest date, under the plan, on which the participant could elect (without regard to any requirement that approval of early retirement be obtained) to receive retirement benefits (other than disability benefits)." The LRS specified no age requirement for early retirement, only the completion of 30 years of service, of which up to five years could purchased. Senator Mello elected to purchase 3 years 3 months of service time which gave him the required 30 years.

IRS regulation 1.411(d)-4 Section 411(d)(6) protected benefits. Q-1: "What are 'section 411(d)(6) protected benefits'? A-1: "(a) In general. The term 'section 411(d)(6) protected benefit' includes any benefit that is described in one or more of the following categories--(2) Early retirement benefits and retirement type subsidies described in section 411(d)(6)(B)(i), including qualified social security supplements ad defined in sec. 1.401(a)-12."

Senator Mello met all the requirements in the LRS plan at the time of his resignation and retirement midnight September 30, 1989. It was after that date, November 21,1989, that the Legislature in Special Session met to repeal the LRS benefits it had increased by overriding the Governor's veto June 23, 1989.

The Attorney General of Nevada

claims that the repeal was not done for political reasons. Then why did her deputy have entered into the court record copies of stories from the Nevada Gazette-Journal and Sparks Tribune which demonstrated the highly political nature of the LRS benefit increase? Why did she, the Washo district court, and Nevada Supreme Court make such an issue of the petition that Common Cause threatened to circulate if the increases had not been repealed, if this was not a political issue?

APOLOGY

Our sincere apologies to this Honorable Court for including information in our petition that was not part of the record. We are aware Washoe District Court judge granted the state's request for a protective order to prevent the Court Administrator from testifying as to

pensions for individual judges. But we understood that the judge allowed our attorney to enter into the record the information about various judges that we had gleaned from public record.

CONCLUSION

Petitioners respectfully request that this Honorable Court approve the Petition for a Writ of Certiorari as submitted.

Dated: November 2, 1994.

Respectfully submitted,

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